Petition

81-405

No.

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In the Supreme Court of the United States

October Term, 1981

DOROTHY W. WOLFE, Individually,
DOROTHY W. WOLFE, Executrix of the Estate of
JOHN HAROLD WOLFE, Deceased,

and

JOHN WOLFE,
Petitioners,

vs.

CONTINENTAL CASUALTY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

CHARLES E. BRANT, *Counsel of Record*
of the Firm of
GLANDER, BRANT, LEDMAN & NEWMAN
250 East Broad Street
Columbus, Ohio 43215
614/221-2121
Counsel for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

1. Whether the duty of an insurer to deal truthfully and in good faith with its insured in the conduct of its insured's defense is one implied in every written insurance contract.

2. Whether an insured has an action for breach of contract against its insurer for dealing falsely and in bad faith with him during the conduct of his defense by the insurer, as well as an action in tort.

3. Whether in a case removed from state court, a federal court should, in the absence of controlling state law, overrule an earlier state court decision in the case, thereby denying to the citizens of such state a right of action enjoyed by the citizens of other states under the same contract.

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CONTINENTAL CASUALTY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The petitioners Dorothy W. Wolfe, individually and as Executrix of the Estate of John Harold Wolfe, deceased, and John Wolfe respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 6, 1981.

OPINIONS BELOW

The opinions of the Court of Appeals, the first, rendered on February 4, 1976 and reported in volume 529 of the Federal Reporter, Second Series, at page 98; the second, rendered on May 6, 1981, and reported in volume 647

of the Federal Reporter, Second Series, at page 705; and the opinion of the District Court, rendered March 20, 1978, unreported, each appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 6, 1981. A timely request for an extension of time to September 3, 1981, in which to file this petition was granted by Mr. Justice White on July 20, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following Ohio Statutes are involved in this case:

§2305.06. Except as provided in section 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued.

§2305.09. An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor if it is for fraud, until the fraud is discovered.

STATEMENT OF THE CASE

The facts as found by the District Court in his Findings and Conclusions entered on March 20, 1978 (App. A11), are wholly favorable to petitioners and fully support the judgment that Court rendered. Significantly, these facts have never been disputed by the respondent.

The facts may be summarized as follows:

In 1956, the late John Harold Wolfe was a partner in an automobile dealership located in Lawrence County, Ohio, then known as The Ironton-Russell Motor Co. On that date there was in effect a written contract of insurance, namely, a garage liability policy, issued by respondent, Continental Casualty Co. to The Ironton-Russell Motor Co. This policy was subject to a limitation of liability of $100,000.00 payable to any one person on account of bodily injury for which an insured thereunder might be found to be liable.

John Harold Wolfe and Dorothy W. Wolfe (mistakenly referred to in the Court of Appeals opinion as Mary Wolfe) were the parents of John Wolfe who, in 1956, was a minor aged 16 years. John Wolfe had an Ohio junior probationary driver's license, the application for which was signed by Dorothy W. Wolfe, thus making her financially responsible for damages caused by John Wolfe in driving an automobile.[1]

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1. Liability imposed by statute, §4507.07, Ohio Revised Code.

On January 21, 1956, John Wolfe was operating, with his father's permission, a motor vehicle covered by the aforesaid insurance policy. Riding with him in said vehicle was one Carol Sue Cyrus. An accident occurred, as a result of which Carol Sue Cyrus was severely injured and permanently disabled. Continental was notified and, through its agents and employees, undertook the investigation of the accident and the adjustment of the claim of Carol Sue Cyrus and her parents against the Wolfes. Although reasonable offers of compromise well within policy limits were made by the Cyruses through their attorney, Continental refused to deal with or negotiate with Cyruses' attorney. The Wolfes were not informed of this by Continental but instead were told that everything was under control and that they should not concern themselves.

Thereafter, on March 9, 1957, suit was commenced by the Cyruses against the Wolfes in the Court of Common Pleas of Lawrence County, Ohio, seeking damages as a result of the injuries to Carol Sue sustained in said accident. Continental assumed the defense of this action on behalf of the Wolfes, but continued to refuse to discuss settlement with the Cyruses. Continental assured petitioners that the claim and suit would be handled and disposed of at no cost to them, and though it advised Mr. Wolfe of his right to engage counsel to protect his uninsured interest, Continental's attorney twice vetoed the Wolfes' choice of counsel, saying he could not work with the attorneys selected. At the same time, it told the Cyruses and their attorney that it had no obligation to respond in damages for want of coverage under the policy, but it did not inform the Wolfes of this position and did not disclose to them any policy defense it was asserting. John Harold Wolfe sought to settle directly with the Cyruses out of his own funds, but was falsely told by Continental that if he did so, he would void his coverage under Continental's policy. The

petitioners were not informed by Continental of the status of the suit prior to trial or of the fact that approaches to settlement made by the Cyruses were summarily rejected by Continental. In fact, this information was intentionally concealed from them.

On February 14, 1958, the personal injury suit was called for trial before a jury. Before the commencement of trial, the Cyruses, through their attorneys, offered to settle for the sum of $40,000.00. This offer was rejected by Continental, notwithstanding the fact that the verdict potential of said suit greatly exceeded $40,000.00. This offer was not communicated to the Wolfes and they were excluded from all of the conferences between counsel, at and during the trial. On February 18, 1958, the jury returned a verdict in favor of the Cyruses and against the Wolfes in the sum of $200,000.00. Thereafter, and during the pendency of an appeal, the case was settled on July 11, 1958 for the sum of $156,000.00, with Continental paying the $100,000.00 limits of its policy and the Wolfes paying the additional $56,000.00, depleting their savings and investments to do so.

In all of this, Continental was careful to conceal from its insureds what had taken place. Respondent's counsel privately expressed relief to his company that the matter was over without more serious results to the insurance company.

Thus, the Wolfes were left to believe things were as they had been represented until the fall of 1972 when John Wolfe, now grown and himself an attorney, one day chanced to speak about the case with the attorney who had represented the Cyruses in 1958. Then and only then, to their great shock and surprise, did John Wolfe and his parents learn of the duplicity of Continental; how offers of settlement had been made and rejected; how coverage

had been disclaimed; and how the Wolfes had been misinformed of the Cyruses' position and of their right to seek a compromise directly. Realizing then that they had been deceived, they retained counsel and on November 29, 1972, directed that suit be filed.

Suit was commenced on this claim in the Common Pleas Court of Lawrence County, Ohio, on January 24, 1973. In that court, Continental filed a motion to dismiss, raising the defense of the statute of limitations and laches, arguing that the action was barred by a four-year statute of limitations provided in Section 2305.09, Ohio Revised Code.[2] This motion was overruled by the state trial judge on May 18, 1973. Thereafter, upon dismissal of an Ohio resident defendant, Continental removed the case to the United States District Court in August, 1973, on grounds of diversity of citizenship.

Once in the District Court, Continental filed a motion for summary judgment on July 1, 1974, again raising the statute of limitations defense. The District Court considered the motion for summary judgment to be but a request to "reconsider" the earlier motion to dismiss addressed to the state court and sustained the motion on January 21, 1975, thereby reversing the earlier ruling of the state court.

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2. §2305.09. An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor if it is for fraud, until the fraud is discovered.

The Wolfes appealed to the Court of Appeals for the Sixth Circuit which found that the allegations of the complaint stated a claim for breach of contract as well as a commission of a tort. It properly held that the contract action was governed by the fifteen-year limitation prescribed by Section 2305.06, Ohio Revised Code[3] and remanded the case to the District Court to allow petitioners to present their claim for damages sustained by the alleged breach of contract (529 F.2d 98, February 4, 1976).

By agreement, the case was resubmitted to the trial court for final disposition upon depositions, affidavits, exhibits and the briefs of counsel. On March 20, 1978, the district judge found the issues in favor of petitioners and directed that judgment be entered for them in the amount of $119,840.00 and costs. This judgment was entered March 30, 1978 and on April 7, 1978 Continental filed a motion for a new trial and to reconsider. The District Court found these to be not well taken and denied them. Continental thereupon appealed to the Court of Appeals. The case was argued on July 14, 1980 before Chief Judge Edwards and Judge Celebrezze, two of the judges who heard the original appeal in 1976, the third member of the original panel, Judge Wade McCree, having left the Court to serve as United States Solicitor General. He was replaced on the second panel by Judge Peck.

On May 6, 1981, the Court of Appeals reversed the District Court's judgment, holding that the Wolfes could not maintain a contract action on their policy in the absence of an express provision in the policy requiring the insurance company to deal in good faith with its insured

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3. §2305.06. Except as provided in section 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued.

and to advise the insured of the opportunity to settle his personal liability. It rejected the rule that good faith dealing is an implied covenant in every written insurance policy.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW ERRONEOUSLY ABOLISHES THE IMPLIED PROVISIONS OF GOOD FAITH IN EVERY WRITTEN POLICY OF INSURANCE

Like virtually every other policy of liability insurance issued in the United States, the policy in issue here contains no explicit provision that the insurance company shall deal truthfully and in good faith with its insured when it undertakes the insured's defense in a suit. Neither does it "expressly delineate a standard of conduct by which the lawyering of the insurance company can be measured," to adopt the Court of Appeals' phrase (Opinion of May 6, 1981, p. 7). The petitioners have never claimed or suggested that it did.

When the Court of Appeals first decided this case in 1976, the Court held that the facts set forth in paragraphs 5 and 6 of the complaint did in fact state a claim for breach of contract (Opinion of the Court of Appeals, February 4, 1976, p. 2) and remanded the case for proof by petitioners of the damages they sustained due to violation of contract, not to learn what the clauses in the policy said.

In doing so, the Court of Appeals accepted and followed the established reasoning of every significant decision of the major courts that have directly considered whether an insured may maintain a contract action on his policy against his insured which violates its duty of good

faith. The doctrine was recognized and well-stated in 1914 by the Court of Appeals of New York in *Brassil v. Maryland Casualty Co.*, 210 N.Y. 235, 104 N.E. 622. In a case where the insurer refused to settle within limits and thwarted its insured's desire to do so, the court held the insurer liable under its policy for the ensuing loss to its insured. It said:

> . . . The true measure of the rights of the plaintiff on the one hand and of the obligations of the defendant on the other is not to be found in the letter of the contract of insurance. That contract, by its very terms, was designed to exclude any such liability. But there is a contractual obligation of universal force which underlies all written agreements. It is the obligation of good faith in carrying out what is written. The defendant's failure to observe this requirement of the contract in suit is the thing upon which its liability may safely be predicated. Its failure to continue the defense of these cases was in effect a breach of its contract.
>
> * * * * *
>
> In the light of these conditions it is idle to look to the letter of the insurance contract for the measure of the defendant's liability, and the fact that there are no precedents for such an action as this is a very impressive indication of the unusual and inequitable attitude of the defendant. Without attempting to further characterize the defendant's position, it is enough to say that it would be a reproach to the law if there were no remedy for so obvious a wrong as was inflicted upon this plaintiff. His rights, as we have said, go deeper than the mere surface of the contract written for him by the defendant. Its stipulations imposed obligations based upon those principles of fair dealing

> which enter into every contract. Even the defendant has invoked this implied obligation of good faith and fair dealing not expressed in the terms of its written contract, for by its answer it has set forth that it was incumbent upon the plaintiff to "deal fairly and in good faith * * * and that he should not voluntarily or knowingly do any acts which would impose on him or on this defendant a loss in the premises." If this was the plaintiff's duty, it was not less the correlative obligation of the defendant to "deal fairly and in good faith" with him.

A breach of contract was found to exist by the Supreme Court of Pennsylvania in *Gray v. Nationwide Mutual Ins. Co.*, 422 Pa. 500, 223 A.2d 8, 11. There, an insurer refused to negotiate an auto injury claim and a judgment was rendered in excess of the policy limits. An action over was brought against the insurer, who pleaded a tort statute of limitations. The court held that the contract statute controlled, saying:

> Our task is to determine whether MacLatchie, the insured, has a cause of action in assumpsit or in tort against the insurer for its wrongful refusal to settle. In Cowden v. Aetna Casualty and Surety Company, 389 Pa. at 468, 134 A.2d at 227, the late Mr. Chief Justice Charles Alvin Jones stated: "It is established by the greatly preponderant weight of authority in this country that an insurer against public liability for personal injury may be liable for the entire amount of a judgment secured by a third party against the insured, regardless of any limitation in the policy, if the insurer's handling of the claim, including a failure to accept a proffered settlement, was done in such a manner as to evidence bad faith on the part of the insurer in the discharge of its contractual duty."

> Giving the reason for this rule, Mr. Chief Justice Jones continued: "And, in Wiener v. Targan, 100 Pa. Super. 278, 284, it was recognized that the contractual relationship under an indemnity policy was one requiring 'a high degree of good faith in the conduct of the indemnity company's counsel generally * * *'" 389 Pa. at 469, 134 A.2d at 228. In Gedeon v. State Farm Mutual Automobile Insurance Company, 410 Pa. 55, 188 A.2d 320 (1963), Mr. Justice Cohan elaborated on the duties of an insurer to his insured: "Under a typical automobile liability insurance policy, such as the one before us, the insurer undertakes three distinct types of obligations, each of which involves different elements of proof to establish breach thereof, and from the breach of which different measures of recovery result." 410 Pa. at 58, 188 A.2d at 321. "Thirdly, by asserting in the policy the right to handle all claims against the insured, including the right to make a binding settlement, the insurer assumes a fiduciary position towards the insured and becomes obligated to act in good faith and with due care in representing the interests of the insured." 410 Pa. at 59, 188 A.2d at 322.

The California Supreme Court noted and held in *Comunale v. Traders & General Insurance Company*, 50 Cal. 2d 654, 328 P.2d 198, 203:

> Traders contends that an action on an implied obligation arising out of contract is not on the written instrument . . . We do not agree. *The promise which the law implies as an element of the contract is as much a part of the instrument as if it were written out.*

The court earlier having observed that:

> A breach which prevents the making of an advantageous settlement when there is a great risk of lia-

> bility in excess of the policy limits will, in the ordinary course of things, result in a judgment against the insured in excess of those limits. (328 P.2d at 202)

Subsequently, the same court in *Crisci v. Security Insurance Company of New Haven*, 66 Cal. 2d 435, 426 P.2d 173, affirmed that "in every contract, including policies of insurance, there is an implied covenant of good faith and fair dealing that neither party will do anything which will impair the rights of the other to receive the benefits of the agreement."

In *Smith v. Transit Casualty Company* (E.D. Texas), 281 F. Supp. 661, 668, *aff'd* 410 F.2d 210, the district court said:

> The Defendant contends that the court cannot honor an assignment of a cause of action for excess judgment by the insured of the judgment creditor because it is an assignment of tort action . . . This court disagrees. Although the cause of action, if any, sounds primarily in tort the duty to use ordinary care in settlement negotiations also constitutes an implied contractual warranty in its policy to exercise at all times due care when utilizing its expertise in the exclusive control of investigating and defending claims against the insured. Thus, *an action based on breach of this duty also sounds in contract*, and may, therefore, be properly assigned." [Emphasis added]

Other cases may be cited. In *Young v. American Casualty Co., etc.*, 416 F.2d 906 (2d Cir.), and in *Roberie v. Southern Farm Bureau Casualty Company*, 250 La. 105, 194 So. 2d 713, insurers were found to have violated implied terms of their policies by keeping their insureds in the dark and not advising them of offers of settlement from claimants who ultimately recovered in excess of the policy

limits. In *none* of the above cases were there express terms defining or delineating good faith standards.

Significantly, although the majority of Court of Appeals stated it was applying Ohio law in reaching its decision, *no* Ohio case has rejected the doctrine that good faith is an implied covenant in every insurance contract and *no* Ohio court has held that an action *ex contractu* cannot be maintained for the breach of that covenant. In fact, the Ohio Supreme Court in its most recent decision in the area of insurer bad faith specifically declined to say whether a contract action could be maintained on the policy and denied the claimant relief for failure of proof of the alleged bad faith. This case is *Spitler, Admr. v. State Auto Mutual, Inc.*, 61 Ohio St. 2d 242, 400 N.E.2d 889 (1980), discussed at some length by the Court of Appeals in their opinion. The court's syllabus in *Spitler* reads:

> In an action by an insured against his insurer to recover an amount in excess of policy limits, an insured must allege and prove bad faith as defined in *Wasserman v. Buckeye Union Cas. Co.*, 32 Ohio St. 2d 69, and in *Slater v. Motorists Mutual Ins. Co.*, 174 Ohio St. 148, paragraphs one and two of the syllabus, unless the insurance policy provides for a stricter standard.

The decision simply establishes the elements of bad faith that must be proved to recover; it makes no attempt to limit a claimant to a tort action only. Indeed, the case recognizes that the insurance policy might expressly provide a stricter standard for bad faith than that which the law implies, but that emphasizes, rather than abolishes, the contract right of action. The Supreme Court of Ohio simply found that there was no evidence as to bad faith—regardless of the form of action—and held for the insurer. Here is what the court said:

> The trial court held that an action for damages resulting from a judgment in excess of policy limits could not be maintained in contract, while the Court of Appeals held that even if such action could be maintained in contract, the bad faith standard, as defined in *Wasserman, supra,* would nevertheless apply. Thus, both courts granted summary judgment because they ruled that bad faith, as to which there was no genuine issue, was a prerequisite to the insurance carriers' liability.
>
> We sustain the courts' rulings but limit our holding to the covenants with which we are faced. Both insurance policies stipulate merely that the insurer "shall defend any suit," without delineating the applicable standard of conduct. Pursuant to such a covenant as insurer has a mandatory duty to defend, but if such defense is commenced the applicable standard is "bad faith," as defined in *Wasserman, supra.*
>
> The judgment of the Court of Appeals is affirmed.

The Sixth Circuit Court of Appeals obviously confused the required standard of proof necessary to recover with the form of action in which recovery is sought. Thus it concluded that since the standard of proof is a typical tort standard, the action can only be a tort action. An ordinary breach of contract is a breach of contract, but an egregious one is not. The Court misread the rule that a breach of contract cannot be a tort without tortious conduct, to require that a tort cannot be a breach of contract. This overlooked the established Ohio rule as stated in 1 O.JUR.3d, *Actions,* §68:

> . . . a wrongful act may constitute a breach both of a duty imposed by law and an obligation imposed by contract, for, accompanying all contracts there is a duty

> implied by law to perform the thing agreed to be done, with skill, care, expediency, and faithfulness, and a negligent failure to observe any of these conditions gives rise to an action ex delicto, as well as to an action for a breach of the contract. It has been stated to be elementary that if there has been negligence in the performance of a contract, suit may be brought in tort. . . . Conversely, where the wrongful act is both a tort and a breach of contract, plaintiff is generally permitted to waive the tort and sue ex contractu. The defendant in such case is estopped to set up that he committed a tort rather than a breach of contract.

There is no want of proof of bad faith here; the record is redolent with evidence of perfidy, aptly and succinctly described by dissenting Chief Judge Edwards as "this classic example of an insurance company's betrayal of its insured's interests."

The unfortunate and aberrant departure of the Court of Appeals from the heretofore well-established law in this area justifies the grant of certiorari to review the judgment below.

2. THE DECISION BELOW DENIES TO CITIZENS OF OHIO IMPORTANT CONTRACT RIGHTS OF ACTION ENJOYED BY CITIZENS OF OTHER STATES UNDER IDENTICAL POLICIES OF INSURANCE

As the majority and the dissenting Chief Judge of the Court of Appeals recognize that Ohio law should be followed in a diversity case, it is important to recall that this action was originally brought by petitioners in an Ohio state court. While the case was pending there and before removal, the respondent, Continental Casualty Company,

appeared and filed a motion to dismiss, contending that the action could be a tort action only and that it was time-barred by Section 2305.09, Ohio Revised Code, specifically, section D thereof which prescribes a four-year statute of limitations:

> (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, etc. of the Revised Code.

Petitioners joined the issue, contending for the fifteen-year limitation period for actions on written contracts provided by Section 2305.06, Revised Code, pointing out that the obligation to exercise good faith arises by virtue of the policy and the reservation therein by the insurer of the right to defend and settle claims, creating mutual obligations of good faith. Stated another way, there is no obligation on an insurer to exercise good faith but those implied from the expressed covenants in the policy. Thus, by its terms, the four-year statute is inapplicable because the Wolfes' rights in fact did arise by virtue of a contract. The state trial judge agreed and overruled Continental's motion to dismiss.

Subsequently, a resident defendant was dismissed and Continental thereafter removed the case to the United States District Court on grounds of diversity of citizenship and by motion, again raised the same statute of limitations defense. All parties and the District Court agreed that there are no decisions of Ohio appellate courts or of the Ohio Supreme Court which are in point. (*E.g.*, see the Findings and Conclusions of the District Court, March 20, 1978, p. A14.) Nevertheless, the District Court sustained the motion and dismissed the case. However, on remand, the District Court held the action was not time-barred (Conclusion of Law No. 2) and further found that

there was no evidence that respondents were aware of their right of action prior to October, 1972, "so it cannot be said that they consciously did nothing to enforce their rights for an unconscionable length of time." (Conclusion of Law No. 3). Indeed, as the Chief Judge Edwards noted: "the insurance company continued fraudulently to conceal the material facts upon which the present judgment is based until after the Ohio statute of limitations as to tort claims had run."

Therefore, to reach the unfair result the majority felt constrained to announce, the Court of Appeals had to:

1. Accept the District Court's finding that no Ohio authority was controlling;

2. Disregard the one Ohio state court decision directly in point; the prior order of the common pleas court in this case overruling the statute of limitations motion to dismiss;

3. Acknowledge that in 1980, the Ohio Supreme Court and the Court of Appeals of Wood County, Ohio, although presented with an opportunity to do so, specifically declined to rule that an action *ex contractu* could not be brought for insurer bad faith;

4. Ignore the rule that, in Ohio as elsewhere, the same set of facts can give rise to both an action *ex delicto* and an action *ex contractu*, and that the actions are not mutually exclusive. *Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537; *Pullman Co. v. Roos*, 9 Ohio App. 309; RESTATEMENT, *Contracts*, §231 d.3.; 1 O.JUR.3d, *Actions*, §68;

5. Ignore the equally well recognized rule that, in Ohio as elsewhere, fraudulent concealment of facts giving rise to a cause of action tolls the running of the statute of limitations, whether for tort or contract, until the true facts become known. *Moherman v. Nickles*, 140 Ohio

St. 450, 45 N.E.2d 405; *Markese v. Ellis,* 11 Ohio App. 2d 160, 299 N.E.2d 70; 18 COUCH ON INSURANCE 2d, §75:206;

6. Be willing "to reward this insurance company for fraudulent concealment of material facts from its insured, thereby securing the insured's contribution of $56,000 to the over limits settlement," a sum now grown to over $135,000 with the accumulation of legal rate interest; and

7. Deny to Ohioans a right of action in contract against their insurers who defend them in bad faith to their damage when, under identical insurance policies, residents of other states possess such rights.

It is recognized that federal courts in diversity cases are not bound by the *nisi prius* decisions of the states in which they sit, even where, as here, that *nisi prius* decision was the prior law of this case. But they are enjoined to give due regard to such decisions, recognizing the persuasive force of a decision rendered by the state court on the same issue. *King v. Order of Travelers,* 333 U.S. 153; *Hill v. U.S.F.&G. Co.,* 428 F.2d 112, *cert. den.* 400 U.S. 1008. We submit the Court of Appeals not only completely disregarded the state court's ruling on the statute of limitations defense, it ascribed to the Supreme Court of Ohio moral insensitivity to the sense of justice represented by the judgment of the trial court in this case and an outright rejection of the persuasive and well-reasoned decisions of the highest courts of New York, Pennsylvania and California discussed above.

Not only should it have been loath to ascribe such a disposition to the Ohio court, it should have recognized that the Ohio Supreme Court in *Spitler, supra,* expressly left open the door the Sixth Circuit peremptorily shut.

It would have been preferable to address this appeal to the state supreme court, where it might have gone had

petitioners' choice of forum been left undisturbed; but in the event, it must be this Court which is asked to correct the injustice which this misconception of the law creates and to restore the contract rights of action of all Ohio policyholders. There is no other place or power to which to turn.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the Sixth Circuit.

Respectfully submitted,

CHARLES E. BRANT
GLANDER, BRANT, LEDMAN & NEWMAN
250 East Broad Street
Columbus, Ohio 43215
614/221-2121
Attorneys for Petitioners

APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed May 6, 1981)

No. 78-3385

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN HAROLD WOLFE, *et al.*,
Plaintiffs-Appellees,

v.

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellant.

APPEAL from the United States District Court
For the Southern District of Ohio.

Before: EDWARDS, *Chief Judge*, CELEBREZZE and PECK, *Senior Circuit Judges.*

CELEBREZZE, *Senior Circuit Judge*, delivered the opinion of the Court in which PECK, *Senior Circuit Judge*, joined. EDWARDS, *Chief Judge*, filed a separate dissenting opinion.

CELEBREZZE, *Senior Circuit Judge.* The issue in this diversity case is whether Ohio law permits an action to be maintained in contract by an insured against his insurer to recover an amount in excess of policy limits when such an action has traditionally been regarded as sounding in tort.

The lawsuit was originally filed in 1973 by John Harold Wolfe and his wife, Mary Wolfe, alleging a breach of duties owed them by Continental Casualty Company under an automobile liability policy in connection with an automobile accident that occurred in 1956. The Wolfe's sixteen year old son, John Wolfe, was operating an automobile when he lost control of his car, resulting in very serious injuries to his passenger, Carol Sue Cyrus. Suit was filed by her parents, the Cyruses, against Dorothy Wolfe and her son, seeking to recover for the injuries sustained by Carol Sue. At the time of the accident, John Harold Wolfe was a partner in an automobile dealership which had in force a garage liability policy issued by Continental Casualty Company to the Ironton — Russell Motor Company. The policy had a $100,000.00 limit and provided in part that the company would "defend any suit against the insured . . . even if groundless, false or fraudulent, but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient."

Prior to trial the Cyruses made two offers to settle the case, both to the insurance company. The first offer was for $25,000.00, and the second was for $40,000.00. Agents for Continental Casualty rejected both offers, without advising the Wolfes that any offers had been made. This was done in spite of the fact that the Wolfes had urged a settlement and had offered to participate in the settlement out of their own funds. Continental had also refused to accept a working arrangement with the Wolfe's personal attorney so that the Wolfes would be fully apprised of the progress of the lawsuit prior to trial.

On February 14, 1958, the trial of the Cyrus' action commenced, and after the Cyrus' motion for a directed verdict was denied, they offered to settle the lawsuit, this time for $100,000.00. Continental rejected that offer, again

without advising the Wolfes. The case was subsequently submitted to the jury, which returned a verdict of $200,000.00. While the appeal was pending Continental negotiated a settlement for $156,000.00, with Continental paying $100,000.00 and the Wolfes the remaining $56,000.00.

In 1972, John Wolfe, now grown and himself an attorney, had a happenstance conversation with the attorney who had represented the Cyruses in 1958. For the first time, the Wolfes learned of the offers of settlement that had been made and rejected, and how Continental had disclaimed coverage when speaking of the Cyruses. In 1973 an action was commenced by the Wolfes seeking the amount of the judgment which they had paid, $56,000.00, plus interest. The complaint sounded primarily in tort, asserting that Continental had acted in bad faith in defending and refusing to settle the action brought by the Cyruses in 1958. Continental removed the suit to federal court on diversity grounds and filed a motion for summary judgment, based on the statute of limitations. Considering the complaint to allege only a tort claim for wrongful refusal to settle a valid claim, the District Court agreed that the Ohio four year statute of limitations governing tort actions was a valid defense, and dismissed the case. On appeal, this court, in a split decision, affirmed the dismissal of the bad faith count, but remanded the case for consideration of a portion of the complaint which alleged a violation of a contractual duty. *Wolfe v. Continental Casualty Co.*, 529 F.2d 98 (6th Cir. 1976). The tort claim was dismissed by the District Court because O.R.C. Sec. 2305.09 provides for a four-year statute of limitations concerning tort claims. We affirmed the dismissal of the tort claim based on the statute of limitations, rejecting the argument that the statute should have been tolled. We noted, however, that certain paragraphs of the complaint alleged a breach of contractual duty on the

part of Continental to advise its policyholder of the possibility of settlement. These allegations could not be ruled on because neither the District Court nor this court had the insurance policy as evidence to consider. The policy between Continental and Ironton - Russell Motor Co. which was operative in 1956 had been lost and the parties responsible for its maintenance at the insurance company were deceased. We thought it appropriate to allow plaintiffs an opportunity to present proofs on their contract claim in light of the fact that the District Court had disposed of the case on summary judgment.[1] If plaintiffs were able to establish a breach of the insurance contract, after first entering a policy into evidence, they could then avail themselves of O.R.C. Sec. 2305.06 which establishes a fifteen year statute of limitations for written contracts. *Wolfe, supra,* 529 F.2d at 100.

On remand, a model insurance contract was provided by stipulation of the parties. The District Court found that the policy did not contain a specific provision requiring the insurance company to settle or to notify the insured regarding settlement negotiations. In the absence of such a provision, the court noted the judgment for Continental would be appropriate. Nevertheless, the court concluded that the scope of the remand was not so precisely defined. Although the court acknowledged that viewing the remand was solely for the purpose of determining whether the insurance policy expressly provided for notification to the insured regarding settlement was a "possible interpretation" of our opinion, the District Judge concluded that such an interpretation would not satisfactorily

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1. My dissenting opinion in the initial appeal of this case was based upon the failure of the plaintiffs, in my view, to proffer a case sufficient to withstand a motion for summary judgment, i.e. the existence of an insurance contract providing that the company was obligated to notify the insured regarding the possibility of settlement.

explain the remand, and that, in any event, two appeals would be better than one.[2] The court proceeded to recognize a duty of good faith dealing implied from the contract, allowing the case to be classified as one for breach of contract, rather than tort. Based on Continental's conduct in defending the lawsuit, the District Court found that Continental had "breached its duty to the insured to fairly enter into such negotiations by disclaiming liability based on lack of coverage, failing to convey offers of settlement to the insured . . . and keeping the insured in the dark by effectively keeping the insured from participating through separate counsel of the insured's choice." The court also found a "breach of contractual duty on the part of Continental to advise its policyholder of the possibility of settlement." Relying on our opinion in *Wolfe I* that the fifteen year statute of limitations pertaining to written contracts would apply to plaintiffs' contract claims, if any, the Court held that the lawsuit had been timely brought. Judgment was subsequently entered for plaintiffs in the amount of $119,840.00 and costs. Continental then filed this appeal.

Ohio law is well settled that an insurer owes a duty to exercise good faith in defending and settling claims against the insured and a breach of that duty will give rise to a cause of action by the insured. *Centennial Ins. Co. v. Liberty Mutual Ins. Co.*, 62 Ohio St. 2d 221 (1980); *Slater v. Motorists Mutual Ins. Co.*, 174 Ohio St. 148 (1962); *Hart v. Republic Mut. Ins. Co.*, 152 Ohio St. 185 (1949). Historically, Ohio law has regarded the claim of bad faith or wrongful refusal to settle as an intentional tort of an

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2. The District Court was unable to reconcile the remand directions with *Battista v. Lebanon Trotting Ass'n.*, 538 F.2d 111 (6th Cir. 1976). The discussion of *Battista, infra*, makes clear that that decision would not bar a contract action for breach of an *express* duty of good faith dealing.

active and affirmative nature. *Wasserman v. Buckeye Union Casualty Co.*, 32 Ohio St. 2d 69 (1972); *Slater, supra.* Most recently the Ohio Supreme Court in *Spitler v. State Auto Mutual, Inc.*, 61 Ohio St. 2d 242 (1980), held that in an action by an insured to recover an amount in excess of policy limits, the insured must allege and prove bad faith as defined by *Wasserman* and *Slater* unless the insurance policy provides for a stricter standard. In *Spitler* the trial court held that an action for damages resulting from a judgment in excess of policy limits could not be maintained in contract but could be maintained only in tort, and on that claim bad faith had not been proven. The court of appeals affirmed ruling that even if an action in contract could be maintained, the bad faith standard of *Wasserman* would nevertheless apply. The Ohio Supreme Court declined to address the issue directly, holding only that once an insurer commences a defense, the applicable standard is bad faith. To date then, the Ohio Courts have recognized only actions in tort when an insured seeks to recover, as here, an amount in excess of policy limits.

The primary benefit to the plaintiffs of bringing this action as one in contract is the fifteen year statute of limitations which applies to claims based on a written contract; actions in tort are limited to a four year period. Obviously, plaintiffs' only chance of prevailing here is in contract, since we earlier affirmed the dismissal of the tort action because it was not brought within the four year limit. It is true that a few jurisdictions permit actions to recover an amount in excess of policy limits to be maintained in contract as well as in tort. Most notably, California permits the plaintiff to proceed on a contract theory to avoid the shorter statute of limitations applicable to tort actions. *Communale v. Traders & Gen.*

Ins. Co., 50 Cal. 2d 654 (1958); *Commercial Union Assurance Comps. v. Safeway Stores, Inc.*, 26 Cal. 3d 912 (1980); *see also Gray v. Nationwide Mutual Ins. Co.*, 422 Pa. 500 (1966). The basis of the contract claim is the implied duty of good faith and fair dealing which the California Supreme Court has found to be inherent in every insurance contract.[3] Plaintiffs argue that, in applying Ohio law, we should adopt the *Communale* approach despite Ohio's classification of such actions as torts.

In *Spitler, supra,* the Ohio Supreme Court chose not to decide whether an action such as this could be prosecuted under a contract theory, holding only that when an insurer undertakes the defense of an action against the insured, the insurer must act in good faith. In other words, to recover an amount in excess of policy limits, the insured must allege and prove bad faith *unless* the contract provides otherwise. This failure to imply a duty of good faith dealing from the contract suggests that the Ohio courts would view actions to recover an amount in excess of policy limits as arising exclusively in tort, unless the insurance contract expressly delineates a standard of conduct by which the lawyering of the insurance company can be measured. This construction of *Spitler* squares with the strict reading which the Ohio courts

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3. The rationale for the "*Communale* duty" was articulated by the court as follows: "It is common knowledge that a large percentage of the claims covered by insurance are settled without litigation and that this is one of the usual methods by which the insured receives protection. The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim. Its unwarranted refusal to do so constitutes a breach of the implied covenant of good faith and fair dealing." (Citations omitted).

are prone to adopt when interpreting insurance contracts. *See Orris v. Claudio*, 63 Ohio St. 2d 140 (1980).

This approach also is consistent with that taken by the courts of Ohio in other matters. Generally, the courts will not look to an action's form as a matter of remedial procedure. Rather, the focus is on the nature or subject matter of the case. For instance, all actions the real purpose of which is to recover damages for personal injury are governed by a two year limitation and it makes no difference whether such action is for a breach of contract or strictly in tort. The limitation is imposed on the cause of action and the form in which the action is brought is immaterial. *Andrianos v. Traction Co.*, 155 Ohio St. 47 (1951); *Globe American Cas. Co. v. Goodman*, 410 Ohio App. 2d 231 (1974). The purpose of the instant action is to recover damages for injury to the plaintiffs' rights; the cause of action is basically one of bad faith. Thus, even if we were to recognize an action in contract, its elements would be identical to the tort action and the four year statute of limitations might apply in light of Ohio's unwillingness to apply different statutes of limitations to identical claims.

Battista v. Lebanon Trotting Ass'n, 538 F.2d 111 (6th Cir. 1976), also provides support for this result. In *Battista*, we held that under Ohio law the claim of malicious refusal to perform a contractual obligation is founded on a legal duty, not a contractual duty. As such, the action could be maintained in tort but not in contract. We recognized that a tort exists only if a party breaches a duty which he owes to another independently of the contract, that is, a duty which would exist even if no contract existed. The tort liability of parties to a contract arises from the breach of some positive legal duty of good faith imposed by law because of the relationship of the parties, rather

than from a mere omission to perform a contractual obligation. In the insurance context, Ohio imposes the legal duty of good faith dealing regardless of the terms of the insurance contract. This legal duty to act in good faith precludes implying a duty to support a contract action.

Battista also relied on the Ohio authority that a breach of contract does not create a tort claim. The still valid rule of *Ketcham v. Miller*, 104 Ohio St. 372 (1922), forbids parties to convert contract actions into tort actions by attacking the motives of a breaching party, as the motive of a breaching party is irrelevant to a contract action. To apply the bad faith standard to a duty implied from the contract would controvert this policy by making the motive of the breaching party the dispositive factor. Moreover, the availability of a tort claim makes it fair to assume that a contract action should not be available; under Ohio law the existence of a contract action generally excludes the opportunity to present the same case as a tort claim.

The Ohio courts regard this action as a tort case in which bad faith must be proven. In light of the above analysis, we see no reason to conclude that Ohio would permit recharacterization of this action as one based on contract. The decision of the District Court is reversed.

EDWARDS, *Chief Circuit Judge*, dissenting. With all respect to my colleagues, I would affirm the District Judge in this appeal. Of course, we apply Ohio law in any diversity case; but where, as here, the facts are *sui generis*, we should apply that law as we believe the Ohio Supreme Court would apply it if it had this particular case to decide.

To me, reversal of the District Court's judgment serves to reward this insurance company for fraudulent concealment of material facts from its insured, thereby securing

the insured's contribution of $56,000 to the over the limits settlement. Additionally, the insurance company continued fraudulently to conceal the material facts upon which the present judgment is based until after the Ohio statute of limitations as to tort claims had run.

I believe that if the Ohio Supreme Court had this classic example of an insurance company's betrayal of its insured's interests before it, the court would affirm the reasoning and decision of the trial judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(Filed March 20, 1978)

No. 8924

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN HAROLD WOLFE, *et al.*,
Plaintiffs,

VS.

CONTINENTAL CASUALTY CO., *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PORTER, *CJ.*:

This is a diversity case in which the plaintiffs seek damages for an insured's alleged bad faith refusal to settle a claim against its insureds within the policy limits. It grows out of a case tried in February, 1958, in the Common Pleas Court of Lawrence County, Ohio. Following a verdict in that Court against the insured, the case was settled, with the insureds paying $56,000 over and above the coverage furnished by defendants' policy. Fourteen and a half years later this action was filed in the Common Pleas Court of Lawrence County. In the meantime, all the participants in the case on the defense side died.

After removal, the defendant insurance company filed a motion for summary judgment (doc. 13) asserting the

defenses of the statute of limitations and the equitable doctrine of laches. The Common Pleas Court of Lawrence County had already denied such a motion. Because the order of the state court was interlocutory, it was subject to reconsideration. This Court treated the new motion as a motion for reconsideration, and dismissed the action on the ground that it was barred by O.R.C. § 2305.09, which provides for a four-year period of limitations for certain tort actions. The Ohio cases have consistently characterized this type of action as sounding in tort. *See Wasserman v. Buckeye Union Casualty Co.*, 29 Ohio App. 2d 7, 14, 277 N.E. 2d 569, 575 (Ct. App. Cuyahoga Cty) *aff'd on other grounds*, 32 Ohio St. 2d 69 (1972). *See* also Judge Celebrezze's dissent in the previous appeal in this case.

On appeal, the Sixth Circuit affirmed in part, reversed in part, and remanded for further proceedings in *Wolfe, et al., v. Continental Casualty Co., et al.*, 529 F. 2d 98 (6th Cir. 1976). The complaint recited in part that "defendant Continental and defendant Bull's predecessor, Beauge . . . acted in bad faith in the conduct of the defense of the aforesaid claim and suit against plaintiffs. . ." The Court of Appeals affirmed this Court's conclusion that this language stated a claim in tort, and that such claim was barred by O.R.C. § 2305.09.

However, the Court of Appeals interpreted ¶¶ 5 and 6 of the complaint as a claim for violation of contract, in that ¶¶ 5 and 6 alleged a breach of a contractual duty on the part of Continental to advise its policyholder of the possibility of settlement.[1]

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1. 5. On January 21, 1956, plaintiff John Wolfe was operating with his father's permission, a motor vehicle covered by the aforesaid insurance policy. Riding with him in said vehicle was one Carol Sue Cyrus. While John Wolfe was operating the said vehicle, an accident occurred, as a result of which Carol Sue

(Continued on following page)

The Court of Appeals ruled that as to this claim the 15-year statute of limitations contained in O.R.C. § 2305.06 applied. Accordingly, this Court's judgment dismissing the case in its entirety was vacated and remanded "in order to allow plaintiffs to offer proofs concerning their claim that they had suffered damages due to violation of contract. . ."

The parties have stipulated (doc. 37) to the submission of the case on the merits, on the depositions, affidavits, and exhibits filed in connection with their cross-motions for summary judgment. In other words, the case is submitted as if it had been formally tried.

The defendant contends that the only purpose in the reversal by the Court of Appeals was to allow this Court

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Footnote continued—

Cyrus was severely injured and permanently disabled. Beauge and defendant Continental were duly notified and the latter, through its agents and employees, undertook the investigation of the accident and the adjustment of the claim of said Carol Sue Cyrus and her parents against plaintiffs. Although reasonable offers of compromise well within policy limits were made by the Cyruses through their attorney, Continental and Beauge, through their adjuster, refused to deal with or negotiate with Cyruses' attorney. Plaintiffs were not informed of this by Continental or Beauge.

6. Thereafter, on or about March 9, 1957, suit was commenced by the Cyruses against plaintiffs in the Court of Common Pleas of Lawrence County, Ohio (Case No. 35823), seeking damages as a result of the injuries to the said Carol Sue Cyrus, sustained in said accident. Continental assumed the defense of said action on behalf of plaintiffs, but refused to discuss settlement with the Cyruses. Continental and Beauge assured plaintiffs that the claim and suit would be handled and disposed of at no cost to plaintiffs. Continental told the Cyruses and their attorney that it had no obligation to respond in damages for want of coverage under said policy, but it did not inform plaintiffs of this position and did not disclose to plaintiffs any policy defense it was asserting. Plaintiff John Harold Wolfe sought to settle directly with the Cyruses out of his own funds, but was told by Continental that he could not do so without voiding his coverage under Continental's policy. Plaintiffs were not informed by Continental or Beauge of the status of the suit prior to trial or of the fact that approaches to settlement made by the Cyruses were summarily rejected by Continental.

to determine whether the insurance policy in issue contained a specific contractual obligation by the insurance company to settle or notify the plaintiffs regarding settlement negotiations, and that in the absence of such a specific contractual obligation in the policy, the case should be dismissed. This is a possible interpretation of the Sixth Circuit Opinion.

If this is what the Court of Appeals meant but did not say, then the only issue in this case would be whether the insurance policy in question contains an express obligation on the part of the insurance company to advise the plaintiffs regarding settlement. Continental can no longer produce the exact policy involved, but has provided a specimen policy which both parties offer as the only evidence of the policy involved in this case. It does not contain such a provision. Because it does not, judgment for the defendant insurance company would be appropriate.

On the other hand, ¶¶ 5 and 6 do not allege the existence of any such express provision. Nor is the term "contract" used or any reference to a policy provision made in either paragraph. Plaintiffs argue that the Court of Appeals ruled that ¶¶ 5 and 6 state a claim in "implied" contract, and that the 15-year statute of limitations applies. This is also a defensible interpretation of the Sixth Circuit's opinion. Unfortunately, no authority was cited in that opinion bearing on the question of whether this action was properly brought on a contract theory. No Ohio authority is available.

According to the most common rationale, the insurance company's duty with respect to settlement arises not from any particular contractual provision, but rather from the relationship created by the liability contract as a whole. *Keeton, Insurance Law* § 7.8 (1971). A standard clause in a liability policy, and one present in the contract be-

tween Wolfe and Continental (in the specimen policy) provides that the company shall defend but "may make such investigation, negotiation and settlement of any claim or suit as it deems expedient." Whether characterized as a duty arising in contract or tort, such a clause does create a duty of good faith. *Hart v. Republic Mut. Ins. Co.*, 152 Ohio St. 185, 87 N.E. 2d 347 (1949). While the insurance company's duty is usually referred to as sounding in tort, Keeton points out that there is support for allowing the insured to proceed on either theory. There are not many cases on point because no one is likely to care what the action is styled until a question involving the period of limitation or assignability arises.

California law follows the view that an action brought against an insurance company for breach of its duty regarding settlement sounds in both tort and contract. *Crisi v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P. 2d 173 (1967); *Communale v. Traders & General Ins. Co.*, 50 Cal. 2d 654, 328 P. 2d 198 (1958). In *Communale*, the Court specifically stated that plaintiff could rely on a contract theory to avoid the shorter statute of limitations applicable to tort actions, *Communale v. Traders*, 328 P. 2d at 203. The Court reasoned that inasmuch as a large percentage of claims covered by insurance are settled without litigation, and that this is one of the usual methods by which the insured receives protection, an implied obligation of good faith and fair dealing requires the insurer to consider the insured's interest and settle in appropriate cases, although the express terms of the policy do not impose such a duty. In this regard the Court noted that

> "the promise which the law implies as an element of the contract is as much a part of the instrument as if it were written out. . . . Although a wrongful re-

> fusal to settle has been generally treated as a tort . . . [plaintiff has the] freedom of election between an action of tort and one of contract."

Accordingly, the *Communale* Court rejected the insurance company's contention that an action on an implied contract is not an action on a written instrument.

In a similar case, the Supreme Court of Pennsylvania ruled that an insured had a cause of action in *contract* as well as in tort against its insurer for wrongful refusal to settle based on breach of the insurer's obligation to represent in good faith the interests of the insured. In that case, *Gray v. Nationwide Mutual Insurance Co.*, 422 Pa. 500, 223 A. 2d 8 (1966), the plaintiff sued MacLatchie for personal injuries and property damage arising out of an automobile collision. MacLatchie was insured by Nationwide under an automobile liability policy, the coverage of which was limited to $5,000. Nationwide undertook to defend MacLatchie pursuant to a provision of the policy which read

> [Nationwide] shall: (1) defend any suit against a person entitled to protection alleging such injury, sickness, disease or destruction and seeking damages on account thereof. Such suit shall be defended even if groundless, false or fraudulent. *The Company [Nationwide] may make any investigation, negotiation and settlement of any claim or suit as it deems expedient".* (Emphasis added.)

The plaintiff, Gray, obtained a judgment on a jury verdict against MacLatchie for $15,000. Nationwide paid $5,000. MacLatchie assigned to Gray all of his rights against Nationwide in satisfaction of MacLatchie's obligation. Gray then sued Nationwide alleging that prior to the Gray-MacLatchie suit, Gray had made an offer to

settle with Nationwide within the policy limits, but that Nationwide failed to settle, in bad faith. The trial court sustained a demurrer to the complaint, but the Supreme Court of Pennsylvania, which assumed that Nationwide had acted in bad faith, reversed, ruling that the insured, MacLatchie, had an action in contract and that the contract claim was assignable. The Court cited *Communale*, as well as *In re Layton*, 221 F. Supp. 667 (D. Arizona 1963). In *Layton*, Judge East stated that the insured's obligation of good faith, *i.e.*, to consider the impact of its decision to litigate on the insured, could be likened to an implied contractual warranty, and that the breach of that duty sounds in contract. *In re Layton*, 221 F. Supp. 667, 668, n. 1.

Several Ohio cases refer to a duty to inform the insured of compromise offers. *See Netzley v. Nationwide Mut. Ins. Co.*, 34 Ohio App. 2d 65, 296 N.E. 2d 550 (Ct. App. Montgomery Cty. 1971); *Wasserman v. Buckeye Union Casualty Co.*, 29 O. App. 2d 7, 58 O.O. 2d 6 (1972). *See also Young v. American Casualty Co.*, 416 F. 2d 906 (2d Cir. 1969) (New York law). These cases considered a failure to so inform the insured in the context of what constitutes evidence of bad faith. Both cases involved policies containing "defense" provisions identical to the provision in *Gray*. In *Netzley* the Court ruled that "the law injects into [the insurer's right of settlement] the condition that such must be carried out in good faith."

This Court's Opinion of January 21, 1975 (doc. 19) specifically ruled that although the duty to exercise good faith arises out of a contractual relation, that that does not make the action itself one arising "on contract," citing Ohio authorities. After reviewing the Court of Appeals' Opinion in light of the authority available from other jurisdictions, this Court can only conclude that the Sixth

Circuit disagreed with our interpretation of Ohio law, or there would have been no partial reversal and remand.[1]

This Court cannot be absolutely certain what the Court of Appeals had in mind when it remanded this case to allow plaintiffs to offer proofs concerning their claim that they suffered damages due to a breach of contract. What is obvious is that one additional appeal is better than two, from the point of view of the litigants as well as the Court of Appeals. Despite the difficulties encountered in applying the contract statute of limitations, the Court concludes that it must do so. Therefore, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52.

FINDINGS OF FACT

1. In 1956 the late John Harold Wolfe was a partner in an automobile dealership located in Lawrence County, Ohio, known as the Ironton-Russell Motor Company. On that date, there was in full force and effect a written contract of insurance, a garage liability policy, issued by Continental Casualty Company to the Ironton-Russell Motor Company, policy #AGL6084062, subject to a limitation of liability of $100,000 (PXA). Both parties offer, as the only evidence of the contents of that policy a specimen AGL garage liability policy (attached to the parties' pretrial statements).

2. The policy provides, in pertinent part:

II. Defense, Settlement, Supplementary Payments
... *the company shall*

(a) *defend any suit against the insured* alleging such injury, sickness, disease or destruction

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1. This Court cannot reconcile this aspect of *Wolfe v. Continental Casualty Co.*, 529 F. 2d 98 (6th Cir. 1976) with *Battista v. Lebanon Trotting Ass'n*, 538 F. 2d 111, 117 (6th Cir. 1976).

> and seeking damages on account thereof, even if such suit is groundless, false or fraudulent, *but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.* (Emphasis added.)

3. Plaintiffs John Harold Wolfe and Dorothy W. Wolfe were the parents of plaintiff John Wolfe who, in 1956, was a minor aged 16 years. John Wolfe had an Ohio junior probationary driver's license, the application for which was signed by Dorothy W. Wolfe. On January 21, 1956, while John Wolfe was operating with his father's permission a car covered by the above policy, an accident occurred. A passenger, Carol Sue Cyrus, was seriously injured in the accident. Suit was filed in the Common Pleas Court of Lawrence County, Ohio, on March 9, 1957, against two of the plaintiffs, Dorothy W. Wolfe and John Wolfe, by Carol Sue Cyrus and her parents (Case No. 35823). Trial of the action commenced February 14, 1958, and a jury verdict in favor of the Cyruses was rendered on February 18, 1958, in the amount of $200,000. During the pendency of an appeal, the case was settled for $156,000, Continental paying $100,000 and plaintiffs paying $56,000.

4. John Byrne and Homer Edwards, attorneys at law practicing in Ironton, Ohio, and Frank McDonald, attorney and claims superintendent for Continental Casualty at the time of the Cyrus trial, are now deceased. Byrne and Edwards were employed by Continental to defend the Cyrus action, and McDonald was the Continental representative who handled the claim. No one else at Continental had any personal knowledge of the suit or claim (Crim. aff., doc. 13). Another attorney, Lee Kramer, who was retained by Continental to defend the Wolfes, died January 17, 1973 (Hamilton aff., doc. 13). Continental no longer

has any file regarding the Cyrus case (Crim. aff., doc. 13).

5. The Wolfes repeatedly expressed their desire to settle the case before trial (John H. Wolfe depo., pp. 14, 20, 21, 22, 25, 41, 45; Dorothy Wolfe depo., pp. 10, 17). John H. Wolfe and Dorothy Wolfe urged Byrne to settle the case (or asked him to solicit a settlement demand) (John H. Wolfe depo. pp. 21, 22, 41, 45; Dorothy Wolfe depo., p. 17), but were told that there was no need to discuss settlement because it was a case of no liability due to the guest statute (John H. Wolfe depo., pp. 18, 21, 22, 26, 41; Dorothy Wolfe depo., pp. 12, 17).

6. Because the Cyrus claims exceeded the policy limits, the insurance company notified the Wolfes by letter that they had a right to retain their own counsel (John H. Wolfe depo., p. 17; Dorothy Wolfe depo., p. 11). However, Byrne told them that he could not work with Mr. Jeffreys, the Wolfe's first choice, and also told them he did not want Mr. Cherrington, the Wolfe's second choice, in the case. He told them that it was a no liability case, that their counsel was not needed (John H. Wolfe depo., pp. 17, 18) and that the use of out-of-town counsel would prejudice their case (Dorothy Wolfe depo., p. 12; John H. Wolfe depo., pp. 20, 21).

7. The Wolfes were also told by Mr. Byrne that any direct attempts to settle on the part of the Wolfes would result in a loss of insurance protection (Dorothy Wolfe depo., p. 17; John W. Wolfe depo., pp. 20, 21).

8. The evidence shows that offers of settlement well below the policy limits were made by the Cyruses but that such offers were rejected by Continental. Because of the potential "guest statute problem," the Cyruses indicated a willingness to settle for $25,000. This was rejected by Continental, through Byrne, who denied coverage. Af-

ter several amendments to the complaint, trial was set for February 10, 1958. Just prior to trial, the Cyruses made a settlement demand of $40,000, which was rejected by Byrne. After a motion for a directed verdict at the close of plaintiffs' case was denied, the Cyruses demanded $100,000. This demand was also rejected. The Cyruses made their settlement demands to Byrne and Cramer, outside the presence of the Wolfes (Riley aff., doc. 39). None of these offers was communicated to any of the Wolfes (Riley aff., doc. 39; John H. Wolfe depo., pp. 14, 25, 26; John Wolfe depo., pp. 5-7; Dorothy Wolfe, aff., doc. 39).

9. The Wolfes wanted to settle the case before trial, even if such a settlement would have required a contribution of their own funds, and such desires were communicated to Byrne, who responded negatively on the ground that this was a "no liability" case.

10. Mr. Wolfe, Sr., went to Columbus to talk to Continental's claim representative (Wolfe, Sr., depo., pp. 22-23), but never got to see him (See also PXF).

11. Exhibit G, a letter from one of Continental's co-counsel to the other, states that an application to have Mrs. Wolfe appointed guardian in the suit against her minor son was filed to keep John H. Wolfe, Sr., out of the picture for reasons not expressed in the letter.

12. A letter from Continental's adjuster to McDonald, the Continental claims manager, does not suggest a coverage defense (PXA). It does suggest a $10,000 reserve. It indicates that one witness observed the car traveling at an extremely high rate of speed. It also refers to John Wolfe, Jr.'s statement to the police at the scene that he lost control due to icy highway conditions. The adjuster noted that the case involved a most serious exposure, and that the adjuster would not attempt to proph-

esy the extent of any judgment that might be rendered in view of the severe and complete disability of Miss Cyrus. While the adjuster noted the merit in a "guest statute" defense, he also noted that this statue might not be applied by a "sympathetic local court."

13. Exhibit B, a letter from the claims manager to his home office, recognized that the case might very well be lost in the trial court, but that the company might win on appeal.

14. Exhibit C, a letter from Byrne to McDonald, stated that Byrne had talked to John Wolfe, Jr., who told him that he had no knowledge of any unusual condition that might prove hazardous, and that it would be difficult to prove negligence. This is certainly optimistic in view of the adjustor's investigation, which stated "certainly we believe, that your driver was negligent to some degree in spite of the fact that it may not have been willful and wanton" (PXA, Remarks). Byrne's letter did note that there was considerable adverse feeling in the community against the defendants, and that this could prove very damaging if the claim could not be disposed of on purely legal grounds (see also PX's E and H). In Exhibit I, which dealt with the problems of publicity and a change of venue, Byrne noted that the case appeared to be hazardous and unpredictable.

15. After the jury verdict for $200,000 was returned, and during the pendency of an appeal, the Wolfe's personal attorneys, Jeffreys and Cherrington, managed to negotiate a settlement of $152,500. At this point, the insurance company became skeptical for its chances on appeal (PXL), and became aware of the possibility that a refusal to settle at this point might result in a bad faith exposure (PXK).

CONCLUSIONS OF LAW

1. Dorothy D. Wolfe, Executrix of the Estate of John Harold Wolfe, deceased, was properly substituted in the place of John Harold Wolfe as plaintiff.

2. The action is not barred by the statute of limitations. *Wolfe v. Continental Casualty Co.*, 529 F. 2d 98 (6th Cir. 1976).

3. The action involves no claim for equitable relief and was commenced within the period of limitations ruled applicable by the Court of Appeals. Accordingly, the Court concludes that the statute of limitations governs. *See State Mutual Life Assurance Co. v. Heine*, 141 F. 2d 741, 744 (6th Cir. 1944); *Aronovitch v. Levy*, 56 NW 2d 570, 34 ALR 2d 1306 (Minn. 1953); *see also* cases cited in plaintiffs' memorandum, doc. 34, p. 9. Nor is there any evidence that the parties charged with laches were aware of their right of action prior to October, 1972, so it cannot be said that they consciously did nothing to enforce their rights for an unreasonable length of time (suit was filed in January, 1973).

4. The Court concludes that the insurer in the case at bar had a duty to fairly enter into negotiations looking toward a settlement within the policy limits due to the potential and recognized risk of a loss in the trial court with a judgment in excess of the policy limits, the only chance being for a favorable ruling on the law (guest statute) which might very well not be obtained until an appeal.

5. The Court further concludes that the insurer breached its duty to the insured to fairly enter into such negotiations by disclaiming liability based on a lack of coverage, failing to convey offers of settlement to the insured so that the insured might participate in the dis-

cussion of a settlement and make appropriate offers of contribution toward that end, refusing to consider the insured's offers to contribute, and keeping the insured in the dark by effectively keeping the insured from participating through separate counsel of the insured's choice. *See generally Netzley v. Nationwide Mut. Ins. Co.*, 34 Ohio App. 2d 65, 296 NE 2d 550, 559 (Ct. App. Montgomery Cty. 1971) and *Wasserman v. Buckeye Union Casualty Co.*, 29 Ohio App. 2d 7, 16 (Ct. App. Cuyahoga Cty. 1972) (factors indicative of bad faith).

6. For the reasons stated, the Court concludes that judgment should be entered in favor of Dorothy Wolfe, executrix of the Estate of John Harold Wolfe in the amount of $119,840 ($56,000 with interest at the legal rate).[2]

/s/ David S. Porter
United States District Judge

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2. Counsel will prepare and submit a judgment entry.

DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed February 4, 1976)

No. 75-1499

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN HAROLD WOLFE, *et al.*,
Plaintiffs-Appellants,

v.

CONTINENTAL CASUALTY CO., *et al.*,
Defendants-Appellees.

Decided and Filed February 4, 1976.
APPEAL From the United States District Court
For the Southern District of Ohio,
Western Division.

Before: EDWARDS, CELEBREZZE and McCREE, *Circuit Judges.*

The Court delivered a Per Curiam opinion. CELEBREZZE, *J.*, filed a dissenting opinion.

PER CURIAM. This appeal is from an order of the District Court for the Southern District of Ohio granting summary judgment to defendant in a diversity action for damages brought by three plaintiffs against their automobile insurer. The action was based upon plaintiffs' complaint which recites in part that "defendant Continental and defendant Bull's predecessor, Beauge . . . acted in bad faith in the conduct of the defense of the aforesaid claim and

suit against plaintiffs . . . ." The District Judge properly construed this and other language in the complaint to represent an action in tort. He thereupon held that the total action was barred by O.R.C. § 2305.09 which provides for a four-year statute of limitations concerning certain tort actions.

On examination of the pleadings in this case, however, we believe that the complaint, particularly paragraphs 5 and 6 thereof, also states an action for violation of contract. These paragraphs are as follows:

> 5. On January 21, 1956, plaintiff John Wolfe was operating with his father's permission, a motor vehicle covered by the aforesaid insurance policy. Riding with him in said vehice was one Carol Sue Cyrus. While John Wolfe was operating the said vehicle, an accident occurred, as a result of which Carol Sue Cyrus was severely injured and permanently disabled. Beauge and defendant Continental were duly notified and the latter, through its agents and employees, undertook the investigation of the accident and the adjustment of the claim of said Carol Sue Cyrus and her parents against plaintiffs. Although reasonable offers of compromise well within policy limits were made by the Cyruses through their attorney, Continental and Beauge, through their adjuster, refused to deal with or negotiate with Cyruses' attorney. Plaintiffs were not informed of this by Continental or Beauge.
>
> 6. Thereafter, on or about March 9, 1957, suit was commenced by the Cyruses against plaintiffs in the Court of Common Pleas of Lawrence County, Ohio (Case No. 35823), seeking damages as a result of the injuries to the said Carol Sue Cyrus sustained in said accident. Continental assumed the defense of said ac-

> tion on behalf of plaintiffs, but refused to discuss settlement with the Cyruses. Continental and Beauge assured plaintiffs that the claim and suit would be handled and disposed of at no cost to plaintiffs. Continental told the Cyruses and their attorney that it had no obligation to respond in damages for want of coverage under said policy, but it did not inform plaintiffs of this position and did not disclose to plaintiffs any policy defense it was asserting. Plaintiff John Harold Wolfe sought to settle directly with the Cyruses out of his own funds, but was told by Continental that he could not do so without voiding his coverage under Continental's policy. Plaintiffs were not informed by Continental or Beauge of the status of the suit prior to trial or of the fact that approaches to settlement made by the Cyruses were summarily rejected by Continental.

It is our interpretation of these paragraphs that they allege a breach of contractual duty on the part of appellee Continental to advise its policyholder of the possibility of a settlement.

An action for breach of contract under Ohio law is governed by O.R.C. § 2305.06, which establishes a 15-year statute of limitations.

With the above consideration in mind, the judgment of the District Court in dismissing the tort claims of plaintiffs is affirmed, but in order to allow plaintiffs to offer proofs concerning their claim that they had suffered damages due to violation of contract, the judgment previously entered by the District Court dismissing the case in its entirety is vacated and the case is remanded to the District Court for further proceedings.

CELEBREZZE dissenting. In the absence of express language in the Contract of Insurance, that the Insurer agrees to indemnify the Insured for the amount in excess of policy limits, when the Insurer exercises its option not to settle a claim, the only recourse the Insured has is to file an action based on bad faith. The Ohio Supreme Court in *Wasserman v. Buckeye Union Casualty Co.*, 32 Ohio St. 2d 69 (1972) finds that bad faith is a tort action. The action not having been filed within the tort statutory period is barred. I would affirm the Judgment of the District Court.

JUDGMENT ENTRY OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed May 6, 1981)

No. 78-3385

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN HAROLD WOLFE, *et al.*,
Plaintiffs-Appellees,
VS.
CONTINENTAL CASUALTY COMPANY,
Defendant-Appellant.

Before: EDWARDS, *Chief Judge*, CELEBREZZE and PECK, *Senior Circuit Judges.*

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

It is further ordered that Defendant-Appellant recover from Plaintiffs-Appellees the costs on appeal as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

Opposition

Office - Supreme Court, U.S.
FILED
OCT 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-405

In the Supreme Court of the United States

October Term, 1981

DOROTHY W. WOLFE, Individually,
DOROTHY W. WOLFE, Executrix of the Estate of
JOHN HAROLD WOLFE, Deceased,
and
JOHN WOLFE,
Petitioners,

vs.

CONTINENTAL CASUALTY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JACK R. ALTON, *Counsel of Record*
of the Firm of
LANE, ALTON & HORST
155 East Broad Street
Columbus, Ohio 43215
614/228-6885
Counsel for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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No. 81-405

In the Supreme Court of the United States

October Term, 1981

DOROTHY W. WOLFE, Individually,
DOROTHY W. WOLFE, Executrix of the Estate of
JOHN HAROLD WOLFE, Deceased,

and

JOHN WOLFE,
Petitioners,

vs.

CONTINENTAL CASUALTY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATUTES INVOLVED

The following Ohio Statutes are involved in this case:

§2305.06 Contract in writing.

Except as provided in section 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued.

§2305.07 Contract not in writing.

Except as provided in section 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

§2305.09 Four years; certain torts.

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

STATEMENT OF THE CASE

Respondents are not in a position to contest the Statement of Facts set forth by Petitioners because Petitioners chose to wait almost fifteen years after the conduct complained of before bringing this lawsuit. Petitioners owned an automobile agency and, according to their deposition

testimony, had the financial means to, and did, hire several lawyers with whom they discussed their potential and actual liability over and above the insurance coverage afforded by Respondent. Despite having the financial means to consult with lawyers and to conduct an investigation of the circumstances surrounding the fact that there had been no settlement during the trial in 1958 which resulted in a verdict for $200,000.00, Petitioners took no action for fourteen and one-half years. During the intervening period following the settlement of that judgment for $156,000.00, the trial lawyers who had represented Respondent and the Petitioners had died, and the Claims Superintendent who supervised the entire case had died.

It is rather interesting to note that the driver of the vehicle which was involved in the collision resulting in the $200,000.00 verdict is now a lawyer, and one of the Petitioners. His deposition was taken during the preparation for trial of this action and he stated that he did not feel he was guilty of wanton and willful misconduct, which was the legal requirement in Ohio under the Guest Statute at the time of the accident and trial. Since he did not think he was guilty of wanton and willful misconduct, certainly the attorneys who were representing his parents and the Respondent were justified in proceeding to try the case.

At the first hearing before the Court of Appeals for the Sixth Circuit, the comments and questions of the Judges clearly indicated that the case was remanded to the District Court solely for the purpose of determining whether the insurance policy in question contained a written provision requiring the insurance company (Respondent) to advise Petitioners of settlement negotiations.

Because of the age of this claim when it was filed, neither party was able to produce an insurance policy upon which the coverage was based.

During the interim between the first and second Court of Appeals decisions, the parties agreed to stipulate that a specimen policy contained the provisions which would have been in force in the original policy. In the original opinion of the Court of Appeals for the Sixth Circuit it is clear that the Court sent the case back to the District Court "in order to allow plaintiffs to offer proofs concerning their claim that they had suffered damages due to violation of contract. . ." (A27).

The specimen policy stipulated by the parties did not contain any language that set forth a requirement of good faith in negotiations, or requiring Respondent to keep Petitioners advised of settlement negotiations.

REASONS FOR DENYING THE WRIT

1. THE DECISION BELOW DOES NOT INVOLVE A FEDERAL QUESTION OR A CONSTITUTIONAL QUESTION, NOR IS IT IN CONFLICT WITH ANY PRIOR FEDERAL COURT DECISION OR A PRIOR DECISION BY THE OHIO SUPREME COURT.

Rule 17(1), Rules of Supreme Court of the United States, affirms the Constitutional mandate that the federal courts of appeal are the final forum for an appeal in the federal judicial system, and that a writ of certiorari ". . . will be granted only when there are special and important reasons therefor." The more persuasive issues which may compel this Court to grant a writ of certiorari are set forth under Rule 17(1). None of the illustrations set forth under the Rule is applicable to the issues in this case or the reasons enumerated by the petitioners in their brief.

The issue that has been contested throughout this matter is which statute of limitations is applicable for a claim by an insured that the insurer in bad faith failed to settle a claim that had previously been lodged against the insured. Specifically, the issue has been whether, in Ohio, the fifteen year statute of limitation set forth under Section 2305.06, Ohio Revised Code, is applicable, or whether a statute of limitation of shorter duration must be applied. The question is clearly one of interpreting state law. As the petitioners correctly note, federal courts in diversity cases such as this are enjoined to give due regard to decisions rendered by the state court of last resort on the same issue. *King v. Order of Travelers,* 33 U.S. 153 (1947); *Hill v. U.S.F.&G. Company,* 428 F.2d 112, *cert. den.* 400 U.S. 1008.

The Court of Appeals expressly recognized that in Ohio an insured has a cause of action against its insurer if the latter should fail to deal truthfully and in good faith with its insured in the conduct of the insured's defense. The decision below merely states that in Ohio, such an action by the insured must be brought within four years after the cause of action accrued and that an insured may not wait fourteen and one-half years to file the suit, as the petitioners did herein. As it will be shown in part 2, *infra,* the decision was a correct interpretation of Ohio law.

Examination of the decision by the Court of Appeals indicates that it complied with the mandate that it give due regard to decisions rendered by the state court of last resort on the same issue. The Court of Appeals followed the two Ohio Supreme Court decisions of *Wasserman v. Buckeye Union Casualty Company,* 32 Ohio St. 2d 69 (1972) and *Slater v. Motorists Mutual Insurance Company,* 174 Ohio St. 148 (1962), in reaching its conclu-

sion that Ohio courts regard the claim of bad faith or wrongful refusal to settle as an intentional tort and that no Ohio court has recognized such a claim as one in contract. The petitioner has set forth no Ohio decisions, nor do any exist, which contradict this conclusion.

The decision below by the Court of Appeals also reflects the fact that consideration was given to decisions by Ohio courts on analogous matters, in an effort to give due regard to what would have been the decision by an Ohio court on the same issue. Specifically, the opinion notes that in determining which statute of limitation applies, Ohio courts examine the nature or subject matter of the case, and that they do not base their decision on the form in which the action is characterized. *Adrian v. Traction Company,* 155 Ohio St. 47 (1951); *Globe American Casualty Company v. Goodman,* 41 Ohio App. 2d 231 (1974).

Only after it had duly considered the precedent binding on Ohio Courts, and only after it had considered decisions by the Ohio Supreme Court that dealt with analogous if not identical issues, did the Court of Appeals reach its conclusion. The holding of the Court of Appeals is consistent with its findings on Ohio law, and reads as follows:

> "The Ohio Courts regard this action as a tort case in which bad faith must be proven. In light of the above analysis, we see no reason to conclude that Ohio would permit recharacterization of this action as one based on contract." (page A9)

The petitioners now claim that the decision by the Court of Appeals ignores prior decisions by courts within the State of Ohio which allegedly support their position. The petitioners' brief contains no holding from the Ohio

Supreme Court or a citation to any Ohio court case which states that the bad faith or wrongful refusal to settle by an insurance company provides the petitioner with a cause of action in contract to which the fifteen year statute of limitation applies. The references by the petitioners to decisions from courts outside the State of Ohio interpreting the law in other states is totally irrelevant. It would clearly be contrary to the mandate of *King v. Order of Travelers, supra,* and *Hill v. U.S.F.&G. Company, supra,* for the Court of Appeals to ignore Ohio decisions and Ohio law on this matter, and to base its decision on the law of another state.

It is readily apparent that the reason the petitioners are now seeking review of this matter by this Court is that they hope to obtain an interpretation of Ohio law different from that of the Sixth Circuit. The petitioners have not and cannot cite any authority which shows that the Court of Appeals' interpretation was clearly erroneous. To the contrary, it is evident that the decision was a correct interpretation of Ohio law on this issue. The decision did not take away a substantive right of the petitioners to bring a cause of action against the respondent; it merely stated that the petitioners had to do so within the applicable statute of limitations. Further, the decision below does nothing to suggest that an insured cannot contract for either a different standard of care by an insurance company and/or a longer time in which to bring an action; however, neither of these two provisions exists in the contract in question. Finally, the decision below did not have to deal with the issue of fraud, for none was found by the trial court.

Respondent submits that this matter does not involve either the interpretation of the United States Constitution, a federal regulation, or a federal statute. Furthermore,

the decision below was made only after giving due regard to decisions rendered by the Ohio Supreme Court on this issue. The decision by the Court of Appeals was clearly not erroneous, and hence, respondent submits that this matter does not involve sufficiently special or important reasons to grant the Writ of Certiorari.

2. THE DECISION BELOW WAS A CORRECT DETERMINATION OF PETITIONERS' RIGHTS UNDER OHIO LAW.

A. Under Ohio Law, the Claim of Bad Faith or Wrongful Refusal to Settle by an Insurance Company Is an Action in Tort and Not in Contract.

In Ohio it is well settled that arising out of the relationship between an insurance company and its insured is the duty on the part of the insurance company to exercise good faith in settling claims. Consequently, a breach of that duty provides the insured with a cause of action, if the same is timely brought. *Slater v. Motorists Mutual Ins. Co.*, 174 Ohio St. 148 (1962); *Hart v. Republic Mutual Insurance Company*, 152 Ohio St. 185 (1949). The respondent has never asserted, nor has any court below stated, that under Ohio law an insured may not bring an action for breach of this duty by an insurance company. The controversy throughout has been the length of time the petitioners had to file suit against the respondent. Specifically, the issue in this case is whether the petitioners were required to file the action against the respondent within four years after the cause of action had accrued, or may the petitioners wait, as they have done in this case, for nearly fifteen years to file the suit.

The Ohio Supreme Court has unequivocally held that in order for an insured to recover an amount in excess

of the policy limits, the insured must prove a lack of good faith on the part of the insurance company. *Slater v. Motorists Mutual Ins. Co., supra.* The lack of good faith has been held to be the equivalent of bad faith in failing to settle within the policy limits, and as such, it has in all Ohio cases been characterized as an action in tort. *Slater v. Motorists Mutual, supra*; *Wasserman v. Buckeye Union Casualty Company,* 32 Ohio St. 2d 69 (1972).

The syllabus in *Wasserman* provides:

> "A charge to a jury on the issue of 'bad faith' in an action by an insured against his insurer to recover the amount, in excess of the policy limit, of a judgment rendered against him in a *tort action,* which quotes verbatim paragraph 2 of the syllabus in *Slater v. Motorists Mutual Insurance Company,* 174 Ohio St. 148, is a complete and correct statement of the law of Ohio and a proper charge to the jury." (Emphasis added.)

In the most recent decision by the Ohio Supreme Court on the issue, it was again held that an insured must prove bad faith as defined in *Slater* and *Wasserman* prior to its recovery in excess of its policy limits. *Spitler v. State Auto Mutual Insurance,* 61 Ohio St. 2d 242 (1980). The trial court in *Spitler* held that the action could not be maintained in contract but could be maintained only in tort. The Supreme Court did not specifically address this issue, nor did it reverse itself and hold that the action could be maintained in contract. Hence, to this date no Ohio court has recognized the fact that an action such as this may be maintained in contract; rather, in all cases that interpret Ohio law the bad faith failure to settle a claim is an action in tort.

Not only was the Sixth Circuit Decision in the case at bar consistent with the Ohio Supreme Court on the same issue, but it was also consistent with its prior decisions on the issue. In *Battista v. Lebanon Trotting Association,* 538 F.2d 111 (6th Cir. 1976), the Court held on page 117, of its decision:

> "(12) These cases are the first in Ohio to recognize the legal trend toward punishing an insurance company for willful refusal to pay a valid claim. *Such a tort claim, however, is founded upon a legal duty rather than upon a contractual duty.*
>
> An insurer owes to its insured an implied-in-law *duty of good faith and fair dealing* that will do nothing to deprive the insured of the benefits of the policy." (Quoting from *Fletcher v. Western National Insurance Company,* 10 Cal. Rptr. 78, 47 A.L.R.2d 286, 305 (1970). (Emphasis added.)

The cases cited by the petitioners from jurisdictions outside of Ohio are neither persuasive nor on point. None of these cases is binding on Ohio courts, nor do they interpret Ohio law. In *Gray v. Nationwide Mutual Ins. Co.*, 422 Pa. 500, 223 A.2d 8 (1966), contrary to petitioners' claim, the insured did not plead a tort statute of limitations, nor was the issue raised in the case. The issue in *Gray* was the assignability of the claim. In order for there to be a valid assignment, it was necessary to construe the duty to act in good faith as an obligation implied in contract. Even if the petitioners' cause of action in the instant case could in Ohio be characterized as an action on an implied contract, which it cannot, the six year statute of limitations, §2305.07, Ohio Revised Code, would be applicable and thus bar petitioners' claim (See part 2b, *infra*).

In *Smith v. Transit Casualty Company*, 281 F. Supp. 661, *aff'd* 410 F.2d 210 (E.D. Tex. 1968), the court was again merely considering the assignability of an insured's claim against an insurance company. In Texas a tort claim was not assignable. In *Roberie v. Southern Farm Bureau Casualty Company*, 250 La. 105, 194 So. 2d 713 (1967); *Young v. American Casualty Company*, 416 F.2d 906 (2d Cir. 1969) and *Brassil v. Maryland Casualty Co.*, 210 N.Y. 235, 104 N.E. 622 (1914), the courts did not consider whether the claims were in contract or tort.

The only case mentioned by the petitioners which in any way speaks to the statute of limitation issue is the California case of *Comunale v. Traders & General Insurance Company*, 50 Cal. 2d 654, 328 P.2d 198 (1958). There the question centered around the alleged breach of the insurance company's express contractual duty to defend. California cases had held that insurance policies came within the section of the California Code setting forth the measure of damages for breach of contract. No such Ohio case exists nor does *Comunale* at any time comment upon Ohio law. Furthermore, in *Comunale* the action was brought three and one half years after the cause of action arose, and the issue was whether to apply the two year or four year statute of limitation. In the case at bar the action was not brought until fourteen and one half years after the cause of action arose.

Construing Ohio law on the issue at bar can lead to no conclusion but that Ohio courts and federal courts have at no time held that the bad faith failure by an insurance company to settle a claim is an action in contract. The decision below by the Court of Appeals was correct in its analysis and its holding that in Ohio this can only be an action in tort, and is governed by the four year statute of limitation set forth under §2305.09, Ohio Revised Code.

B. Assuming, Arguendo, That a Cause of Action Lies in Contract, the Petitioners' Claim Would Be Barred by Section 2305.07, Ohio Revised Code.

Section 2305.06, Ohio Revised Code, provides for a fifteen year statute of limitation in:

> ". . . an action upon a specialty or an agreement, contract, or promise *in writing* . . ." (Emphasis added.)

The insurance policy between the petitioners and the respondent did not contain an expressed covenant that the respondent would act in good faith in its efforts to settle the claim against the petitioners. The petitioners contend that such a duty not only arises from the contract, but it also is an obligation implied in contract which establishes a contractual claim for breach of the same.

The cases cited by the petitioners on this issue, all of which are outside of Ohio, provide that an implied contractual warranty exists, the breach of which sounds in contract. In *Smith v. Transit Casualty Company,* 281 F. Supp. 661, 668, *aff'd* 410 F.2d 210 (E.D. Texas 1968), the district court found:

> ". . . the duty owed to use ordinary care in settlement negotiations also constitutes an *implied* contractual warranty in its policy to exercise at all times due care when utilizing its expertise in the exclusive control of investigating and defending claims against the insured." (Emphasis added.)

Crisci v. Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173, 176 (1967), cites *Comunale v. Traders & General Insurance Company,* 50 Cal. 2d 654, 328 P.2d 198 (1958), and states that the covenant of good faith is implied:

> "It was there reasoned that (referring to *Comunale v. Traders, supra*) in every contract, including policies of insurance, there is an *implied* covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. . ." (Emphasis added.)

If it is to be assumed that the Court of Appeals erred, and that the Ohio Supreme Court would have reversed its prior decisions and hold that the petitioners' action could be maintained in contract, the petitioners' claim would be one for breach of an implied covenant and not a written covenant. Thus, the petitioners' claim would be governed by §2305.07, Ohio Revised Code, which pertains to implied agreements and not §2305.06, Ohio Revised Code.

Section 2305.07, Ohio Revised Code, provides:

> ". . . an action upon a contract not in writing, expressed or *implied*, . . . shall be brought *within six years* after the cause thereof accrued." (Emphasis added.)

In support of the application of §2305.07, Ohio Revised Code, are the decisions in *Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537 (1877) and *Pullman Co. v. Roos*, 9 Ohio App. 309 (1917) cited in petitioners' brief. Neither of these two cases dealt with the issue of an alleged bad faith failure to settle by an insurer. However, assuming that the petitioners deem these two cases as precedent, it should be noted that both courts applied the six year statute of limitation applicable to implied contracts.

It is uncontested that the petitioners filed their claim long after the six years had expired. Thus even if the

petitioners' contentions were valid, their claim would be governed by §2305.07, Ohio Revised Code, and would thus be barred.

CONCLUSION

The cases cited by Petitioners from other jurisdictions do not set forth the same fact situation presented here. As we have pointed out above, those cases do not present efforts to extend the period for filing a bad faith claim against an insurance company for fifteen years.

We have raised the defense of laches in each of the Courts which has considered this case. We still think that defense is appropriate. As noted above, the Plaintiffs had the financial means to hire attorneys and investigators to determine what the actual facts were concerning the trial and any settlement negotiations conducted during the trial. Rather than do this, they waited fourteen and a half years and then, based upon an alleged chance conversation with one of the attorneys for the Plaintiff in the original case, chose to file this lawsuit.

If this Court should accept this case for hearing on the merits and decide that Petitioners have a meritorious claim, then the doors will be open for similar lawsuits in every instance where a lawsuit is settled either before or after judgment. To allow such a potential torrent of additional litigation considering the present burden on the Court system would be disastrous.

Petitioners had four years following the time they participated in the settlement of the judgment in which to complete their investigation and to determine whether or not they had a cause of action based upon bad faith.

Having allowed an additional ten and a half years to expire before filing this action, this Court should deny their Petition for Certiorari.

Respectfully submitted,

JACK R. ALTON, *Counsel of Record*
LANE, ALTON & HORST
155 East Broad Street
Columbus, Ohio 43215
(614) 228-6885
Counsel for Respondent